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No. _____

In The

Supreme Court of the United States

RONALD JAY CLIFTON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Can a Petitioner complain, for the first time, in the wake of *Blakely v. Washington*, about a violation of his Sixth Amendment right to trial by jury?

TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals filed April 21, 2004.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals, *United States of America v. Ronald Jay Clifton* is attached as Appendix A. The district court judgment is attached as Appendix B. The Statement for Reasons of upward departure is attached as Appendix C.

JURISDICTION

The judgment and opinion of the Court of Appeals were filed on April 21, 2004. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI to the United States Constitution is set out verbatim in Appendix E.

STATEMENT OF JURISDICTION BELOW

The district court had jurisdiction of this matter as a criminal case based on allegations of violations of 18 U.S.C. § 371 and 15 U.S.C. § 377q and 77x. Appellant pled

guilty to each count on June 26, 2002. He was sentenced on October 28, 2002. Notice of appeal, sentence only, pursuant to 18 U.S.C. §§ 3742(a)(1)(2) was filed on November 2, 2002.

STATEMENT OF THE CASE

Petitioner pled guilty to one count of conspiracy against the laws of the United States and one count of Securities Fraud. The first PSR calculated the guideline range at 70 to 87 months but concluded that 60 months was the statutory maximum for the offenses. A Revised PSR filed October 18, 2002, recommended consecutive sentences to achieve the guideline range of 70 to 87 months.

Petitioner objected at sentencing to any sentence longer than 60 months. The district court adopted the findings and guidelines application in the pre-sentence report, finding a total offense level of 27 and Criminal History Category of I and an imprisonment range of 70 to 87 months.

Although Petitioner objected at the time of sentencing, he did not raise the issue of a violation of Defendant's right to trial by jury on appeal in view of *United States v. McWaine*, 290 F.3d 269 (5th Cir. 2002) and other Fifth Circuit cases construing *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

The appeal of the sentence on abuse of discretion grounds was dismissed on account of the plea bargain waiver of appellate rights.

REASONS FOR GRANTING THE WRIT

An analysis of the Fifth Circuit cases relating to the application of *Apprendi* illustrates that they probably cannot be reconciled with *Blakely v. Washington*, ___ U.S. ___ (2004 W.L. 1402697). The Fifth Circuit clearly approves of sentence enhancing findings by the court based on a preponderance of evidence standard. The sentencing guidelines range is calculated based on judicial determinations of organizer-leader, drug relevant conduct analysis, etc., not supported by a jury verdict or defendant's stipulation. The only limit is the Congressionally enacted statutory maximum for the statute.

Blakely makes it clear that the guideline range calculated based on jury findings or defendant's stipulation is the statutory maximum for sentencing. Although the *Blakely* court views its opinion as a logical application of *Apprendi*, it has created quite a stir in the hinterlands – *Blakely* seems to say:

> " . . . the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by defendant . . . The relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts but the maximum he may impose without any additional findings."

The facts in *Blakely* seem directly on point with the determination of the court in Petitioner's case. The statutory maximum is 87 months. The court went to 120 months based on a finding of extreme conduct.

This case provides an excellent vehicle for construction of *Apprendi* in the context of sentencing guideline ranges. Certiorari should be granted.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this matter.

Date: July 16, 2004

Respectfully submitted,

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INDEX TO APPENDICES

Appendix A Opinion of the Court of Appeals, *United States of America v Ronald Jay Clifton* .....App. 1

Appendix B Judgment of the District Court, *Ronald Jay Clifton v United States of America* .....App. 3

Appendix C Statement of Reasons for upward departure .....App. 11

Appendix D Findings of Fact and Recommendation of the Guilty Plea of Magistrate .....App. 13

Appendix E Amendment VI.....App. 16

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-51205
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RONALD JAY CLIFTON,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. MO-02-CR-48-ALL

(Filed April 21, 2004)

Before JOLLY, JONES, and SMITH, Circuit Judges.

PER CURIAM:*

Ronald Jay Clifton pleaded guilty to counts one and two of an information charging him with conspiracy to commit fraud and securities fraud. Clifton has appealed, raising issues related to the district court's upward departure from

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

the guideline imprisonment range. In his plea agreement, Clifton waived the right to raise these issues on appeal and the record reflects that the waiver was knowing and voluntary. *See United States v. Melancon*, 972 F.2d 566, 567-68 (5th Cir. 1992). We caution counsel that the assertion of issues on appeal that are plainly barred by a plea agreement and the failure to explain in briefing why the defendant's issues are not waived invites the imposition of a sanction. *See United States v. Martinez*, 263 F.3d 436, 438 (5th Cir. 2001). The appeal is

DISMISSED.

APPENDIX B

UNITED STATES DISTRICT COURT
Western District of Texas
MIDLAND/ODESSA DIVISION

UNITED STATES OF AMERICA

v.

RONALD JAY CLIFTON

Defendant.

Case Number:
MO-02-CR-048-F(01)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

(Filed Oct. 30, 2002)

The defendant, RONALD JAY CLIFTON, was represented by Floyd D. Holder, Jr.

The defendant pled guilty to Count(s) one and two of the information on June 5, 2002. Accordingly, the defendant is adjudged guilty of such Count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date of Offense Concluded	Count Number(s)
18 U.S.C. 371	Conspiracy to commit fraud	April 2002	1
15 U.S.C. 77c & 77x	Securities fraud	April 2002	2

As pronounced on October 28, 2002, the defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $200.00, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this the 29th day of October, 2002.

/s/ Royal Furgeson
ROYAL FURGESON
UNITED STATES DISTRICT JUDGE

Defendant's SSN: 463-02-4969
Defendant's Date of Birth: 12/11/65
Defendant's address: 103 North Washington; Odessa, Texas 79761

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of sixty (60) months as to both counts to run consecutively.

The Court recommends to the Bureau of Prisons: that the defendant be committed to the most appropriate facility deamed [sic] necessary.

The defendant is remanded to the U.S. Marshals pending service of sentence.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____ , with a certified copy of this Judgment.

_____
United States Marshal

By /s/ _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years as to both counts to run concurrently.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this court as set forth on page 4 of this judgment; and shall comply with the following additional conditions:

X The defendant shall not be permitted to reside any place where firearms are possessed or stored.

X The defendant shall pay any unpaid balance of restitution upon the commencement of the term of supervised release on a schedule to be approved by the Court or the probation officer.

X The defendant shall not incur new credit charges or open linds [sic] of credit without the approval of the United States Probation Officer.

X The defendant shall provide the United States Probation officer access to any required financial information.

X The defendant shall not obtain employment positions involving financial transactions. All employment(s) must be approved by a United States Probation Officer.

CONDITIONS OF SUPERVISION

Mandatory Conditions:

1) The defendant shall not commit another federal, states, or local crime.

2) the defendant shall not illegally possess a controlled substance.

3) If the judgment imposed a fine or a restitution obligation, it shall be a condition of supervision that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervision in accordance with any schedule of payments set forth in the Criminal Monetary Penalties sheet of the judgment. In any case, the defendant shall cooperate with the Probation Officer in meeting any financial obligations.

4) In supervised release cases only, the defendant shall report in person to the probation office in the district

to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

5) If convicted of a felony, the defendant shall not posses [sic] a firearm, destructive device or any other dangerous weapon.

6) For offenses committed on or after September 13, 1994, the defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment or placement on probation and at least two periodic drug tests thereafter, as directed by the Probation Officer.

The above drug testing condition may be suspended based on the Court's determination that the defendant poses a low risk of future substance abuse.

Standard Conditions:

1) The defendant shall not leave the judicial district without the permission of the Court or Probation Officer.

2) The defendant shall report to the Probation Officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the Probation Officer and follow the instructions of the Probation Officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the Probation Officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the Probation Officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substance, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the Probation Officer.

10) The defendant shall permit a Probation Officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the Probation Officer.

11) The defendant shall notify the Probation Officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.

13) As directed by the Probation Officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the Probation Officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The fine is waived because the defendant's inability to pay.

RESTITUTION AND FORFEITURE

RESTITUTION

The defendant shall pay restitution in the amount of $6,333,929.25 to the payee(s). Restitution shall be paid immediately through the Clerk, United States District Court, 200 E. Wall Street, Midland, Texas 79701 for transfer to payee(s).

Any payment shall be divided proportionately among the payees named.

Name of Payee	Amount of Restitution

(See Exhibit A attached: List of Victims for restitution)

The Court is aware that addresses are not available for all victims in this case. Accordingly, the U.S. District Clerk shall only make distributions to victims with known addresses as provided by the U.S. Probation Office. In the event a victim's address is established after initial payments are made, than that victim's entitlement to payments shall start, prospectively, at that time.

If the defendant is unable to pay this indebtedness, the defendant shall cooperate fully with the office of the United States Attorney, the Bureau of Prisons and/or the United States Probation Office to make payment in full as soon as possible, including during any period of incarceration. Any unpaid balance at the commencement of a term of supervised release may be paid on a schedule of

monthly installments to be approved by the Court and becomes a condition of supervision.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND DIVISION

UNITED STATES OF AMERICA	)	**MO-02-CR-048**
	)	***Sentencing***
v.	)	**October 28, 2002**
RONALD JAY CLIFTON	)	

BEFORE THE HONORABLE ROYAL FERGESON
United States District Judge
In Midland, Texas

* * *

STATEMENT OF REASONS

The Court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court as to both counts:	
Total Offense Level:	27
Criminal History Category:	I
Imprisonment Range:	70 months to 87 months
Supervised Release Range:	2 to 3 years
Fine Range:	$12,500 to $125,000
Restitution:	$6,333,929.25

The court has waived the cost of incarceration:

The Court departs upward from the guideline range and sentences defendant Clifton to the maximum term for both counts to run consecutively. This sentence is warranted because of the number of victims and the callousness of the defendant's behavior. Clifton knew the

majority of his victims for many years. Clifton attended church with these individuals and perpetrated himself as their friend. Clifton had discussed with these victims about their plans to put their children/grandchildren through college and about the fact that the money they were investing was for the future of the children. One victim wrote Clifton attended her grandson's funeral, shed tears, and subsequently convinced her to invest her grandson's life insurance policy.

The defendant placed himself in people's lives under the guise of legitimacy and then preyed on the unsuspecting victims. Clifton went a step further and preyed on elderly victims who he knew did not have the wherewithal to challenge his expertise and would trust him as their friend. Clifton provided religious trinkets to children and subsequently stole their college funds from the children's parent's [sic]. Clifton took his family on vacations with the victim's [sic] funds and had the audacity to bring the victim's [sic] souvenirs from the vacations he took with their money. There is one act that really typifies the man Ron Clifton is; he stole from his own elderly grandparents.

Sometimes it does not matter what good you do in life, because one deed will tell your true nature. This statement is true with child pornographers and fits the defendant's as well. The defendant's ruination of so many lives shows his true character. Many of these victims are elderly, infirm and cannot work. Although they have been hard workers and thrifty with their money to insure themselves a comfortable retirement, Clifton has taken that away from them and now they must depend on others to assist them. They cannot recover from this.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	MO-02-CR-048
	§	
RONALD JAY CLIFTON	§	

FINDINGS OF FACT AND RECOMMENDATION ON FELONY GUILTY PLEA BEFORE THE UNITED STATES MAGISTRATE JUDGE

(Filed Jun. 6, 2002)

Pursuant to Title 28 United States Code, Section 636(b) this matter has been referred by the District Court for administration of guilty plea and allocution under Rule 11 of the Federal Rules of Criminal Procedure.

On the 5th day of June, 2002, this cause came before the undersigned U.S. Magistrate Judge for Guilty Plea and Allocution of the Defendant, **RONALD JAY CLIFTON**, on Counts **ONE** and **TWO** of an **INFORMATION**[1] filed herein charging him in Count **ONE** with a violation of Title 18 U.S.C. § 371 and Count **TWO** with a violation of Title 15 U.S.C. §§ 77(q)(a) and 77(x). The Defendant signed a written consent to plead before the Magistrate Judge. After conducting said proceeding in the form and manner prescribed by FED.R.CRIM.P. 11 the Court finds:

[1] The Defendant filed a written waiver of indictment in open Court.

a) That the Defendant, after consultation with counsel of record, has knowingly and voluntarily consented to the administration of the Guilty Plea and Allocution in this cause by a U.S. Magistrate Judge subject to final approval and imposition of sentence by the District Court.

(b) That the Defendant and the Government have entered into a plea agreement which has been filed and disclosed in open court pursuant to Fed.R.Crim.P. 11(e)(2).

(c) That the Defendant is fully competent and capable of entering an informed plea, that the Defendant is aware of the nature of the charges and the consequences of the plea,[2] and that the plea of guilty is a knowing and voluntary plea supported by an independent basis in fact containing each of the essential elements of the offense.

IT IS THEREFORE, the recommendation of the undersigned U.S. Magistrate Judge that the District Court accept the plea agreement and the guilty plea of the Defendant, **RONALD JAY CLIFTON**, and that **RONALD JAY CLIFTON** be finally adjudged guilty of that offense.[3]

---

[2] The Defendant was admonished as to the punishment for Count **ONE** of up to 5 years imprisonment, a Two Hundred Fifty Thousand Dollar ($250,000.00) fine, 3 years supervised release, a One Hundred Dollar ($100.00) special assessment and restitution. The Defendant was admonished as to the punishment for Count **TWO** of up to 5 years imprisonment, a Two Hundred Fifty Thousand Dollar ($250,000.00) fine, 3 years supervised release, a One Hundred Dollar ($100.00) special assessment and restitution. The plea agreement erroneously refers to an incorrect fine amount. However, the matter was addressed in open Court.

[3] Defendant's Sentencing is set for **September 4, 2002 at 1:15 p.m.**

The United States District Clerk shall serve a copy of this Proposed Findings of Fact and Recommendation on all parties by mailing a copy to each of them. Pursuant to 28 U.S.C. § 636(b)(1), any party who desires to object to this report must serve and file written objections within ten (10) days after being served with a copy unless the time period is modified by the District Court. A party filing objections must specifically identify those findings, conclusions or recommendation to which objections are being made; the District Court need not consider frivolous, conclusive or general objections. Such party shall file the objections with the Clerk of the Court and serve the objections on the Magistrate Judge and on all other parties. A party's failure to file such objections to the proposed findings, conclusions and recommendation contained in this report shall bar the party from a *de novo* determination by the District Court. Additionally, any failure to file written objections to the proposed findings, conclusions and recommendation contained in this report within ten (10) days after being served with a copy shall bar the aggrieved party from appealing the factual findings of the Magistrate Judge that are accepted or adopted by the District Court, except upon grounds of plain error or manifest injustice.

SIGNED this 5th day of June, 2002.

/s/ L. Stuart Platt
L. STUART PLATT
United States Magistrate Judge

APPENDIX E

U.S. CONSTITUTION

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.